No. 08-244

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In The
Supreme Court of the United States

STATE OF CONNECTICUT,

Petitioner,

v.

DANIEL COOK,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Connecticut Supreme Court somehow violated the federal constitution by merely construing its own state statutes (which criminalize the carrying of an otherwise innocuous item, like a cane or baseball bat or table leg, when that item is threatened to be used in a manner in which it is capable of causing serious physical injury) as applying only when the person actually makes a "true threat" to use the item as a dangerous instrument and then by ordering the trial court to conduct a new trial before jurors properly instructed on the Connecticut Supreme Court's construction of the applicable statutes?

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The respondent, Daniel Cook, respectfully asks this Court to deny the prosecution's Petition seeking review of the decision and judgment of the Connecticut Supreme Court in *State of Connecticut v. Daniel Cook*, 287 Conn. 237, 947 A.2d 307 (6/3/2008).

A. INTRODUCTION

1. Contrary to the Assertion of the Prosecution, the Connecticut Supreme Court Did Not Hold Any Connecticut Statutes to be Unconstitutionally Overbroad on Their Face; Instead, the Connecticut Supreme Court Merely Construed Its Own State Statutes

As an initial matter, it should be noted that the assertion by the prosecution in its Petition (p.i; see also pp.10,13,17), that the Connecticut Supreme Court reversed the respondent's conviction under C.G.S. §53-206 & C.G.S. §53a-3(7) for carrying a dangerous instrument on the basis that these provisions are "overbroad on their face" under the First Amendment, is simply not an accurate description of what the Connecticut Supreme Court held in *State v. Cook*, supra. In fact, in *Cook* the Connecticut Supreme Court reversed the respondent's conviction based on an instructional error by the trial court in not instructing the jury with the "true threat" judicial gloss required by the way that Connecticut construes statutes (like those as charged in this case) which criminalize the making of a threat. See 287 Conn. at 246-251. In doing so, the Connecticut Supreme Court

was merely following well established law in Connecticut with regard to the construction of statutes that have the making of a threat as an essential element thereof. See, *e.g.*, *State v. DeLoreto*, 265 Conn. 145, 152-156, 827 A.2d 671 (2003) (where, at the urging of the same state's attorney office, the Connecticut Supreme Court construed the term "threat" as used in another part of the state penal code, to refer to the constitutionally punishable class of "true threats"). Thus, all the Connecticut Supreme Court did in *Cook* was to apply the reasoning and holding of *DeLoreto* to the use of the same term "threat" in another part of the same penal code. See 287 Conn. at 246-251. Indeed, in the *Cook* decision, see *Id.* 249, the Connecticut Supreme Court cited with approval the recognition by the Connecticut Appellate Court in *State v. Skidd*, 104 Conn.App. 46, 55, 932 A.2d 416 (2007), that the previous decision in *DeLoreto*, supra, means "that in order for a threat to be prohibited by statute in Connecticut, that threat must rise to the level of a 'true threat' ".

Thus, contrary to the assertion of the prosecution, in *Cook* the Connecticut Supreme Court did not hold any statute unconstitutional; rather, employing well established statutory constructions principles, the *Cook* Court merely construed the term "threat", as used in the statutory definition of a "dangerous instrument", C.G.S. §53a-3(7) (which is what the prosecutor charged the respondent with carrying in this case), as referring to a "true threat", and not to something that might sound like a threat but in

reality was a joke, hyperbole, bluff and bluster, puffery, etc. In so construing the applicable statutes, the Connecticut Supreme Court was also clearly following the intent of the Connecticut legislature, since it is more than obvious that by enacting §53-206 and §53a-3(7), the legislature did not intend to imprison people for three years for making jokes (or other non-serious, non-true "threats") about using some innocuous item they are carrying, like a baseball bat or stick or hammer or table leg, etc., in a weapon-like manner.

2. The Proper Construction of a State Statute is a Question of State Law, Not Federal Law

It should also be noted here that it is well established that the proper construction of the meaning of a state statute is a question of state law, not federal law. Indeed, this Court has expressly recognized that it is bound by the construction of a state statute made by the highest court of the state. See, *e.g.*, *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) (so holding); see also *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) (recognizing "we are bound by a state court's construction of a state statute"; also recognizing that a state court construes a statute when it "defin[es] the meaning of a particular statutory word or phrase"). All that the Connecticut Supreme Court did in the instant case was to construe C.G.S. §53-206 & C.G.S. §53a-3(7), as charged here, as stating a crime which has as an essential element the making of an actual *threat* to use the otherwise innocuous item in a

manner capable of causing death or serious physical injury in order for the item to qualify as a "dangerous instrument" (§53a-3(7)) it is unlawful to possess (§53-206). The Connecticut Supreme Court then defined the meaning of the term "threat", as used in the statutory definition of "dangerous instrument" (§53a-3(7)), as referring only to constitutionally punishable "true threats". Such a statutory construction is a matter of state law and therefore presents no substantial federal question; the *Cook* Court did not hold any statute unconstitutional. The respondent therefore questions whether this Court really has jurisdiction under 28 U.S.C. §1257(a), as claimed by the prosecution, because no statute of the State of Connecticut was held to be invalid under or repugnant to the federal constitution in this case. One must also question whether the prosecution thinks that this Court is going to tell the Connecticut Supreme Court that the federal constitution requires it to interpret its illegal weapons statutes in such a way that they criminalize the behavior of people who make non-true, non-serious "threats" (such as when joking, engaging in hyperbole, etc.) about innocuous items (non-weapons per se) they are carrying (like a stick or hammer or cane or baseball bat, etc.)? Indeed, since the distinction between a "true threat" and a non-true, non-serious "threat" is by definition the line of demarcation between those threats which can be constitutionally punished ("true threats") and those which may not be (non-true threats), see *Virginia v. Black*, 538 U.S. 343, 359-360 (2003) (so recognizing); *Watts v. United States*, 394 U.S. 705, 708 (1969)

(same), the construction of the statutes advocated by the prosecution in this case is not only NOT the construction actually adopted by the Connecticut Supreme Court (which effectively ends the issue as a matter of federal law), it is also a construction that would itself be in violation of the federal constitution.[1]

B. COUNTER-STATEMENT OF THE CASE

This was originally an appeal by the respondent, Daniel Cook, from his conviction for carrying a dangerous instrument in violation of C.G.S. §53-206 (which, *inter alia*, prohibits the carrying of a "dangerous . . . instrument") *and* C.G.S. §53a-3(7) (defining "dangerous instrument"). The respondent was originally charged with three counts: 1) threatening in the second degree, in violation of C.G.S. §53a-62(a)(1); 2) disorderly conduct, in violation of C.G.S. §53a-182(a)(1); and 3) carrying a dangerous instrument, in violation of C.G.S. §53-206 *and* §53a-3(7). The respondent was acquitted of the charge of disorderly conduct by the trial court at the close of the prosecution's case and was *acquitted* of the charge of

[1] Indeed, in *Cook* the Connecticut Supreme Court itself recognized that "the first amendment would be seriously eroded if we were to adopt the state's view that any statements or conduct conveying a threat to use an otherwise innocuous item in a manner capable of causing serious physical injury may fall within the purview of §§53-206 and 53a-3(7) irrespective of whether the threat reasonably may be characterized as a true threat." 287 Conn. at 251-252.

threatening in the second degree by the jury, but was convicted of the charge of carrying a dangerous instrument. With regard to the latter charge, the prosecution's long-form information specifically charged the respondent with "carry[ing] upon his person an instrument, to wit: a wooden table leg, which under the circumstances in which it was threatened to be used, was capable of causing serious physical injury in violation of §53-206 and §53a-3(7) of the Connecticut General Statutes". The jury was instructed that in order to find that the table leg was a dangerous instrument, they would have to find that the respondent threatened to use it in a manner in which it would be capable of causing serious physical injury. See *Cook*, 287 Conn. at 243-244 (quoting instructions).

C. ARGUMENT AND REASONS FOR THIS COURT TO DECLINE REVIEW

1. As Here Charged by the Prosecution, the Charge of Carrying a Dangerous Instrument, in Violation of C.G.S. §53-206 & C.G.S. §53a-3(7), is a Charge Which Criminalizes the Making of a Threat to Use an Innocuous Item in a Manner Capable of Causing Serious Physical Injury

It is important to start with the recognition that C.G.S. §53-206, a pre-penal code statute prohibiting carrying a dangerous weapon on one's person, applies to two different categories of weapons. The first

category of prohibited weapons consists of *weapons per se*, that is, those weapons that are expressly named within the statute, including such things as long-bladed knives, knives with switch-blades or gravity blades, martial arts weapons, brass knuckles, etc. See C.G.S. §53-206. The second category of prohibited weapons is covered by the general reference in §53-206 to carrying "any other dangerous or deadly weapon or instrument". *Id.* Since a wooden table leg (like a cane or baseball bat or hammer) is an innocuous item which is not a dangerous weapon or instrument per se, it is this second category, and specifically the phrase, "any other dangerous . . . instrument", which is applicable to the charge here.

Although there may be more than one way to define what constitutes "any other dangerous . . . instrument" for purposes of §53-206, the manner in which the prosecution chose to do so in this case, which has been approved by the Connecticut Supreme Court, see *State v. Ramos*, 271 Conn. 785, 794-798, 860 A.2d 249 (2004), was by charging in its long-form information that the respondent violated §53-206 by carrying on his person an object (a wooden table leg) that met the penal code definition of "dangerous instrument" as stated in §53a-3(7). In relevant part, §53a-3(7) provides: "'Dangerous instrument' means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . ".

It is important to note that because there was no evidence whatsoever that the respondent either "used" or "attempted to use" the table leg in any manner on the day in question, the prosecution in its charging document limited itself to alleging that the table leg constituted an illegally carried "dangerous instrument" because of the manner in which it was allegedly "threatened to be used". In particular, the prosecution charged, and thus was required to prove, that on the day in question the respondent "did carry on his person an instrument, to wit: a wooden table leg, which under the circumstances in which it was *threatened to be used*, was capable of causing serious physical injury in violation of §53-206 *and* §53a-3(7)". (Emphasis added.)

This means that one of the essential elements of the prosecution's charge (that the respondent violated §53-206 by carrying a "dangerous instrument" as defined by §53a-3(7)) which the prosecution was required to prove was that the respondent, while carrying the table leg, *threatened* to use it in such a manner that it was capable of causing serious physical injury. What is most important to recognize about the charge in this case is that it is a charge which criminalizes the carrying of an innocuous item (which can literally be almost anything), not based on how the item is used or even attempted to be used, but on how it is *threatened* to be used. As here charged, therefore, §53-206 *and* §53a-3(7) together make it an unclassified felony, punishable by three years imprisonment, for a person to make a *threat* to use some

innocuous item being carried in a manner capable of causing serious physical injury. Thus, the two statutes together, as here charged, criminalize the making of a threat.

2. As Construed by the Connecticut Supreme Court, the Charge of Carrying a Dangerous Instrument, in Violation of C.G.S. §53-206 & C.G.S. §53a-3(7), is a Charge Which Criminalizes the Making of a Threat to Use an Innocuous Item in a Manner Capable of Causing Serious Physical Injury

The above-described construction of C.G.S. §53-206 & C.G.S. §53a-3(7), as here charged, is the construction of these statutes adopted by the Connecticut Supreme Court:

> In the present case, the state alleged that the [respondent] had violated §53-206 by carrying a dangerous instrument within the meaning of General Statutes §53a-3(7), which defines a dangerous instrument in relevant part as 'any instrument . . . which, under the circumstances in which it is *used* or . . . *threatened* to be used, is capable of causing death or serious physical injury. . . .' (Emphasis added.) Thus, for purposes of the present case, the state was required to establish that the [respondent's] conduct in waving the table leg, or the [respondent's] conduct coupled with his remarks, rendered the table leg a dangerous instrument for

> purposes of §§53-206 and 53a-3(7). Under [applicable First Amendment law], however, the [respondent] was entitled to an instruction that he could be convicted as charged only if his statements or use of the table leg constituted a *true threat*, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole.

Cook, 287 Conn. at 250; see also *Id.* 251 (rejecting prosecution's claim that "crime of carrying a dangerous weapon, with which the [respondent] had been charged in the present case, does not implicate the first amendment because it 'does not strike against pure speech . . . but rather various combinations of physical conduct plus speech,'" by noting "it is well established that '[t]he [f]irst [a]mendment affords protection to symbolic or expressive conduct as well as to actual speech.' . . . ").

Thus, as construed by the Connecticut Supreme Court, the crime charged in this case required the prosecution to prove that the respondent *threatened* to use the table leg in a manner capable of causing serious physical injury in order for the prosecution to be able to prove that the leg was a "dangerous instrument" which it was illegal for the respondent to carry. Although ignored by the prosecution in its Petition, it was the prosecution's decision to charge the respondent with carrying a "dangerous instrument"

as defined in §53a-3(7) for the purposes of the charge under §53-206 and it was the prosecution's decision to limit that charge to the accusation that it was illegal for the respondent to carry the table leg because "under the circumstances in which it was threatened to be used, [it] was capable of causing serious physical injury", and thus qualified as a "dangerous instrument" under §53a-3(7).

Of course, the prosecution had to do something like this, because a table leg is not one of the weapons per se that §53-206 makes it illegal to carry. It is not unlawful under §53-206 to carry a table leg or a cane or a stick or a baseball bat, or an umbrella, etc., or any of the thousands or millions of innocuous items that people can and do carry everyday, even though each of these items could be used as and has the potential of being used as a weapon. In order to prove a violation of §53-206, the prosecution has to prove beyond a reasonable doubt that the item was carried as a weapon. One way it can do this is by proving how the item was used, see *State v. Ramos*, 271 Conn. at 794-798 (accused could properly be convicted of illegally carrying a dangerous instrument in a car based on his possessing an ordinary hammer because he *used* the hammer to strike someone so it qualified as a dangerous instrument under §53a-3(7)), but the table leg was not so used in this case. So, the prosecution chose instead to allege that it was illegal for the respondent to carry the table leg because he allegedly *threatened* to use it in a manner in which it would be capable of causing serious physical injury. So charged,

the crime involves an alleged *threat* as an essential element, and so First Amendment jurisprudence concerning which threats are constitutionally punishable and which are not is directly applicable, as the Connecticut Supreme Court properly held.

3. The Connecticut Supreme Court Properly Held that the "True Threats" Doctrine Applies to Its Construction of the Crime Charged Here Under §53-206 & §53a-3(7) Because the Making of a Threat is an Essential Element of that Crime and the "True Threats" Doctrine Is To Be Applied to Any Crime Which Punishes the Making of a Threat

It is well established for purposes of free speech analysis that

> a 'threat' is very different from a 'true threat.' 'Threat' is a nebulous term that can describe anything from 'an expression of an intention to inflict pain, injury, evil, or punishment' to any generalized 'menace.' . . . Under such a broad definition, 'threats' include *protected and unprotected speech*. Thus, *states cannot enact general laws prohibiting all 'threats' without infringing on some speech protected by the First Amendment*. By contrast, 'true threat' is a constitutional term of art used to describe a specific category of unprotected speech. . . . *Watts*, 394 U.S. at 707-08. This category, although often inclusive of speech or acts that fall

> within the broader definition of 'threat,' does not include protected speech. . . . Therefore, states may, consistent with the First Amendment, prohibit all 'true threats.' . . .

(Emphasis added.) *State v. Douglas D.*, 626 N.W.2d 725, 739 (Wisc. 2001); see also *Cook*, 287 Conn. at 247 (quoting, *Douglas D.*, supra); *State v. Perkins*, 626 N.W.2d 762, 767 (Wisc. 2001) (it is undisputed "that some threatening words are protected speech under the First Amendment"; "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats"). Therefore, where a statute purports to criminalize threatening speech, as §53-206 & §53a-3(7) as charged together here do, for such a statute to be constitutional it "must be read as clearly prohibiting only 'true threats'." *State v. Kilburn*, 84 P.3d 1215, 1219 (Wash. 2004); see also *State v. Johnston*, 127 P.3d 707, 709 (Wash. 2006) (statute criminalizing threats "must be construed to limit its application to true threats in order to avoid facial invalidation of the statute on overbreadth grounds . . . under the first amendment"); *People v. Benitez*, 105 Cal.Rptr.2d 242, 249 (Cal.App. 2001) (accused's "conviction cannot stand if he did not make a true threat since, absent a true threat, his words were mere speech protected by the First Amendment. So protected, they cannot be made criminal . . . Constitutionally speaking, conveying anything less than a true threat cannot constitute a crime"). It is for this reason that the Connecticut Supreme Court held, and correctly so, that

> [u]nder th[e] court's decision in *DeLoreto*, [265 Conn. 145] . . . , the [respondent] was entitled to an instruction that he could be convicted as charged only if his statements or use of the table leg constituted a true threat, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole.

Cook, 287 Conn. at 250.

4. Even the Prosecution Agrees that the Connecticut Supreme Court is Correct in Recognizing that First Amendment Jurisprudence Concerning the "True Threats" Doctrine Must Be Applied to Statutes Which Punish the Making of Threats

Ironically, even the prosecution in its Petition recognizes that there are Connecticut statutes which have the making of a threat as an essential element and therefore directly punish the making of threats. (See p.15) The prosecution even recognizes that such statutes "implicate the First Amendment as a result of directly punishing threats" (*Id.*) and thus must be given the "true threats" limiting gloss. What the prosecution fails to recognize is that the statutes charged in this case (§53-206 & §53a-3(7)), *as actually construed by the Connecticut Supreme Court*, are included on the list of statutes which have the

making of a threat as an essential element and therefore directly punish the making of a threat. Although the prosecution might not like or even agree with the Connecticut Supreme Court's actual construction of these statutes, that construction is binding on this Court and ends the prosecution's claim as a matter of federal law.

5. The Prosecution's Reliance on *Wisconsin v. Mitchell* is Misplaced Because It Amounts to Asserting that the Prosecution Prefers a Construction of §53-206 & §53a-3(7) Which is Different From that Adopted by the Connecticut Supreme Court; But This Court is Bound by the Construction of these Statutes Adopted by the Connecticut Supreme Court and *Wisconsin v. Mitchell* is Irrelevant to that Construction

In its Petition (see pp.12-16), the prosecution places heavy reliance on this Court's decision in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) and indeed, the prosecution goes so far as to claim that the Connecticut Supreme Court's decision in *Cook* is in "direct conflict" with the decision in *Mitchell*. (p.15). But there is no merit whatsoever to the prosecution's claim or to its reliance on *Mitchell* because the reasoning and analysis of *Mitchell* apply only to state statutes which do not punish speech and thus *Mitchell* is irrelevant to the statutes at issue in this case.

In *Mitchell*, this Court held that a state statute can punish an underlying crime more severely without violating the First Amendment when the prosecution can prove that the crime was motivated by racial bias. See 508 U.S. at 485-490. The *Mitchell* Court noted that the statute involved did not punish speech and that the motive for which a crime is committed is something which has long been used to enhance punishment. *Id.* 485-488. The Court further noted that the First Amendment is not offended when protected speech is used to prove a non-speech element of a crime, like motive. *Id.* 489-490.

The reason that the Connecticut Supreme Court rejected the prosecution's argument that *Mitchell* is somehow relevant to this case is obvious based on the Connecticut Supreme Court's construction of the statutes involved as defining a crime which does have speech (*i.e.*, threatening to use the otherwise innocuous item in a weapon-like manner) as an essential element and therefore directly punishes speech (*i.e.*, threatening to use the otherwise innocuous item in a weapon-like manner). As noted above, the analysis and reasoning of *Mitchell* simply do not apply to a crime which has speech as an essential element and actually punishes speech.

To try to get around this problem with its reliance on *Mitchell*, the prosecution in its Petition essentially proposes an alternative construction of §53-206 & §53a-3(7). (See pp.13-16.) This proposed alternative construction is different from that adopted by the Connecticut Supreme Court and does

not have the making of a threat as an element and does not punish the making of a threat. The prosecution's proposed alternative construction purports to start with the recognition that "the plain terms of §53-206 do not implicate speech of any kind, but only the unprotected physical act of carrying an instrument that is dangerous." (p.14). Then, according to the prosecution, the definition of "dangerous instrument" in §53a-3(7) is supposed to be viewed as referring only "to the dangerous capacity of the instrument that is carried". (p.14) "Therefore," according to the prosecution, "when §53a-3(7) defines the dangerousness of an instrument not in the abstract, but rather in terms of whether the actual use or threatened use of the instrument reveals its 'capab[ility] of causing death or serious physical injury,'" then supposedly "that definition merely identifies the instrument's threatened use as one type of evidence to be examined for purposes of proving the instrument's dangerous character. The definition does not expand §53-206's element of carrying the instrument to include its use or threatened use and expression communicated by such threats." (p.14) Putting aside for the moment other obvious problems with this proposed alternative construction of §53a-206 & §53a-3(7), the fatal problem with the alternative construction proposed by the prosecution is that it is NOT the construction adopted by the Connecticut Supreme Court.

As noted previously, the Connecticut Supreme Court's construction of §53-206 & §53a-3(7), as here

charged, recognizes that the threat to use the otherwise innocuous item in a manner capable of causing death or serious physical injury is indeed an essential element of the crime charged and that the crime charged does indeed punish speech, which it is constitutionally permissible for it to do because, as construed by the Connecticut Supreme Court, §53-206 & §53a-3(7) punish only "true threats". Thus, the prosecution's proposed alternative construction of the applicable state statutes, which was proposed to the Connecticut Supreme Court below and rejected by that Court, is now simply irrelevant as a matter of federal law. So too is the prosecution's heavy reliance of *Wisconsin v. Mitchell*. The reasoning of *Mitchell* is simply not relevant to the construction of §53-206 & §53a-3(7) actually adopted by the Connecticut Supreme Court because the actually adopted construction does have speech as an element of the crime and it does criminalize the making of a threat. The *Mitchell* Court would certainly recognize and agree that First Amendment considerations apply to such statutes construed in this manner.

In passing it should be noted that the prosecution's proposed alternative construction of §53-206 & §53a-3(7) was rejected by the Connecticut Supreme Court because it is obviously wrong and is foreclosed by the plain text of §53a-3(7). Contrary to the prosecution's alternative construction, the statutory definition of "dangerous instrument" does not merely suggest to jurors that they look to the use or threatened use of an object as somehow evidence of the

item's potential for dangerousness, rather §53a-3(7) employs the actual use or threatened use of the item and whether when so used or so threatened the item is capable of causing death or serious physical injury as the very elements that qualify or fail to qualify the item as being a "dangerous instrument".

It has long been recognized by Connecticut's jurisprudence that an item does not qualify as a "dangerous instrument" merely because the otherwise innocuous item has the potential or character of being able to be misused as a weapon. See, *e.g.*, *State v. Scully*, 195 Conn. 668, 678, 490 A.2d 984 (1985) (an iron bar and chains seized from car near Klan rally did not qualify as "dangerous instruments" under §53a-3(7) because the items were not used or threatened to be used in any manner). An illustrative case is *State v. Grant*, 177 Conn. 140, 411 A.2d 917 (1979), where the prosecution tried to elevate an attempted third degree burglary to an attempted first degree burglary on the ground that the accused was armed with a dangerous instrument, a tire iron, where an accomplice had only used the tire iron to force entry into the house before the would-be burglars fled. The Connecticut Supreme Court ruled:

> Although we conclude that sufficient evidence was presented to implicate the defendant in the attempted break-in, we agree [with the defendant] that the state failed to prove the element of a 'dangerous instrument' necessary to support a conviction for attempted burglary in the first degree in the

> manner alleged by the state. General Statutes §53a-3(7) defines 'dangerous instrument' as 'any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury.' Although it is not necessary under this definition that any physical injury actually have been inflicted . . . it is necessary that '*under the circumstances in which [the instrument was] used or attempted or threatened to be used,*' it was 'capable of causing death or serious physical injury.' (Emphasis added.)
>
> The evidence in the present case tended to establish that, at most, the 'tire iron' was used for the purpose of breaking into an apartment. There was no evidence, and, indeed, there was no claim by the state, that any of the participants in the attempted break-in used, threatened the use of, or attempted to use this object under circumstances capable of inflicting injury upon another. . . . Under these circumstances, we conclude that there was insufficient evidence before the jury to sustain a conviction for attempted burglary in the first degree [while armed with a dangerous instrument]. . . .

State v. Grant, 177 Conn. at 146. In a footnote, the Connecticut Supreme Court expressly disposed of the prosecution's claim that the dangerous character or potential of the tire iron was sufficient to qualify it as a dangerous instrument:

> The state's assertion that a tire iron is *potentially* an instrument of death or serious physical injury cannot, by itself, be the basis for a conclusion that the statutory definition had been satisfied. As we explained in *State v. Jones*, 173 Conn. 91, 97, 376 A.2d 1077 [(1977)], '[t]he statute [*i.e.*, §53a-3(7)] requires that the actual *circumstances* in which the instrument is used be considered and, then, only to determine its potential as an instrument of death or serious physical injury.' The object's potential for injury, therefore, must be examined only in conjunction with the circumstances in which it is actually used or threatened to be used, and not merely viewed in terms of its dangerous capabilities in the abstract.

State v. Grant, 177 Conn. at 146 n.5. So, it is the use or the threatened use of an otherwise innocuous item that makes it qualify as a dangerous instrument, not its character.[2] This means that the use or

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[2] It is simply bizarre for the prosecution to apparently assert that §53-206 is meant to punish the carrying of any innocuous item which has a dangerous character or capability. That is certainly not correct, since it would mean that in Connecticut one could not even carry a cane or an umbrella, or car keys, or tools, or a bottle, or a glass, or a sharpened pencil, etc. The list would be endless since virtually any item can be used to cause serious physical injury if one wants to do so and such items always have this character or capability. It is obvious, therefore, as the Connecticut Supreme Court has held, that the prosecution has to prove more than just that the innocuous item has the capability of being used as a weapon. When the prosecution, as here, chooses to rely on the statutory definition of

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the threatened use of the item is an essential element of any crime incorporating the statutory definition of "dangerous instrument".

Thus, under Connecticut law, as construed by the Connecticut Supreme Court, when the statutory definition of "dangerous instrument" is used to determine whether an accused is guilty of violating §53-206 for carrying an otherwise innocuous item that qualifies as a dangerous instrument under §53a-3(7), the use of that statutory definition does in fact add to the crime the essential elements either that the item is *used* in a manner in which it is capable of causing death or serious physical injury, see *State v. Ramos*, 271 Conn. at 794-798 (so holding), or that the item is *threatened* to be used in such a manner, *State v. Cook*, 287 Conn. at 250-251 (so holding). The decision in *Cook* therefore is not in any way inconsistent with the decision in *Wisconsin v. Mitchell*. In fact, the decision in *Mitchell* is simply not relevant to the statutes at issue in *Cook* since these statues, as construed by the Connecticut Supreme Court, do have speech as an

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"dangerous instrument", §53a-3(7), it must prove that the item was actually used or threatened to be used in a manner capable of causing death or serious physical injury. It is for this reason that, as charged here, the respondent's alleged threat to use the table leg has to be "true", because that would prove he was carrying the table leg as a real weapon because he made a true threat to use it as such; but if the alleged "threat" was not "true", because, it was non-serious, a jest, puffery, or bluster, etc., then the accused would not be carrying the table leg as a weapon and thus he could not properly be convicted of violating §53-206.

element and are aimed at punishing a form of expression, *i.e.*, the making of a true threat to use an otherwise innocuous item in a manner capable of causing death or serious physical injury.

6. Contrary to the Prosecution's Assertions, the Question of Whether an Alleged Threat Under §53-206 & §53a-3(7) Falls Outside of Free Speech Safeguards was Correctly Decided Against the Prosecution's Position by the Connecticut Supreme Court

It should be noted that there is no merit to the assertion by the prosecution in its Petition (p.16) that an alleged threat under §53-206 & §53a-3(7) falls outside of free speech safeguards because such a threat is non-speech which does not have to be communicated to anyone. As §53a-3(7) is construed by the Connecticut Supreme Court, for an otherwise innocuous item to qualify as a dangerous instrument through a threatened use thereof, that threat must be proven by the State to be "a true threat, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole."[3] *Cook*, 287 Conn.

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[3] In *State v. Jones*, supra, the accused used a hockey stick to strike the victim during an attempted robbery and the *Jones* Court held that the *use* of the stick was sufficient to prove that

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at 250. This is a proper application of the relevant First Amendment law.

In addition, the Connecticut Supreme Court properly rejected the prosecution's alternative claim in its Petition (see pp.17-18) that no "true threats" judicial gloss is required because any alleged threat to use an otherwise innocuous object in a weapon-like manner that would satisfy the requirements of §53a-3(7) would automatically be unprotected speech. The *Cook* Court rejected this claim as follows:

> The state asserts that the crime of carrying a dangerous weapon, with which the [respondent] had been charged in the present case, does not implicate the first amendment because . . . '[s]peech that, by its very utterance,' conveys a threat to use an object in a manner capable of causing serious physical injury automatically falls within the category of unprotected true threats. . . . The state's . . . assertion begs the question to be answered by the jury upon applying the true threats doctrine. . . . As a general matter . . . whether such expressive conduct represents a true threat is to be decided by the jury. . . .

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the stick qualified as a dangerous instrument under §53a-3(7). 173 Conn. at 95. The *Jones* Court held that the testimony of the victim that he did not feel threatened by the hockey stick did not matter because the stick had been used. *Id.* Had the stick not been used, but only threatened to be used, the victim's testimony that he did not feel threatened would then have been part of the overall circumstances that would be relevant to the jury's determination of whether the threat was true or not.

> We therefore agree with the [respondent] that the trial court improperly failed to instruct the jury that it could not find the [respondent] guilty of carrying a dangerous weapon under §§53-206 and 53a-3(7) unless it found, on the basis of the [respondent's] conduct or statements, that his alleged threat to use the table leg constituted a true threat and not simply idle talk, banter or some other form of protected expression.

Cook, 287 Conn. at 251-252.

In making its alternative claim, the prosecution again simply fails to recognize that certain types of alleged "threats", those that are made in jest, or that are puffery, bravado, hyperbole, exaggeration, simply not serious, etc., are constitutionally protected and that to make such a protected non-true threat with regard to an innocuous item being carried (like a baseball bat or cane) does not make it illegal to carry such an item.

In holding that the "true threats" limiting judicial gloss was required to be applied to the statutes charged in this case, the Connecticut Supreme Court noted that if the gloss was not applied then the statutes would criminalize constitutionally protected behavior in the form of every type of non-true threats imaginable, including non-serious threats that were jests, or bluster, or puffery or hyperbole, or exaggeration, or idle talk or banter, etc. 287 Conn. at 250-252.

The *Cook* Court gave one example, the softball player hypothetical,[4] that illustrated how general and basic the problem was and then noted that the one example "illustrate[d]" that

> the first amendment would be seriously eroded if we were to adopt the state's view that any statements or conduct conveying a threat to use an otherwise innocuous item in a manner capable of causing serious physical injury may fall within the purview of §§53-206 and 53a-3(7) irrespective of whether the threat reasonably may be characterized as a true threat.

287 Conn. at 251-252. Rather bizarrely, the prosecution tries to claim that the jurors would not convict the softball player, even though not instructed on the "true threats" doctrine, because they would understand the player's reference to striking the *pitcher's head* with the bat to be "demonstrative of the bat's capacity to hit a ball, not its serious potential to be used as a cudgel"! (p.18) The bald absurdity of such an assertion shows how far from reason the prosecution's position has wandered. Ironically, however, the prosecution's suggestion that the jury would only convict if the softball player was "serious" about using

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[4] "Under the state's reasoning, a batter in a softball game who jokes that she is going to hit the pitcher over the head with her bat unless he throws her an easy pitch to hit could be found guilty of carrying a dangerous weapon pursuant to a jury instruction that does no more than mirror the literal language of §§53-206 and 53a-3(7)." *Cook*, 287 Conn. at 251.

the bat as a weapon is most revealing because that is precisely what the required instruction on the "true threats" doctrine limiting gloss is intended to convey to the jurors and what was NOT conveyed by the instructions actually given. The State's own flawed reasoning therefore reveals the correctness of the Connecticut Supreme Court's decision to apply the "true threats" judicial gloss and to order a new trial before jurors properly instructed with that gloss.

Ultimately, the prosecution fails to recognize that

> [b]ecause the trial court's jury charge [in this case] contained no reference to the requirement of a true threat – in other words, because the court's instructions did not include the judicial gloss on §§53-206 and 53a-3(7) that is necessary under *DeLoreto* [265 Conn. 145] – the jury could have found the [respondent] guilty on the basis of conduct that did not rise to the level of a true threat. Consequently, under the trial court's instructions, the jury's finding of guilty could have been predicated on expressive conduct protected by the first amendment.

Cook, 287 Conn. at 251. Of course, this is not constitutionally acceptable and the Connecticut Supreme Court properly decided that the correct response was, not to hold any statute unconstitutional, but rather to construe the statutes involved by applying the "true threat" doctrine as a limiting gloss and then to order a new trial. *Id.* 251-252.

7. The Respondent is Entitled to the New Trial Ordered in this Case Before Jurors Properly Instructed on the "True Threats" Limiting Gloss Which the Connecticut Supreme Court has Construed as Being Part of the Statutes Charged

As a consequence of the Connecticut Supreme Court's decision to construe §53-206 & §53a-3(7), as here charged, by applying thereto the "true threats" doctrine as a limiting gloss, the respondent is entitled to a new trial. As the Connecticut Supreme Court properly recognized in *Cook*:

> In light of the history between the [respondent] and DelFranco, and DelFranco's conduct before, during and after the [respondent's] allegedly unlawful use of the table leg, a properly instructed jury could have found that a reasonable person in the [respondent's] position would not have foreseen that his statements and actions would be interpreted by DelFranco as a serious expression of an intent to harm but, rather, as mere banter, jest or exaggeration.

287 Conn. at 252.[5] Because of this, the trial court's constitutional error in not instructing the jurors with the "true threats" limiting gloss could not be shown to be harmless beyond a reasonable doubt. *Id.* 252-253. As the Connecticut Supreme Court correctly recognized, *Id.* 258, a new trial before properly instructed jurors is therefore required.

D. CONCLUSION

Contrary to the assertions of the prosecution, the decision of the Connecticut Supreme Court in *State v. Cook* does nothing to "erode" or "blur" this Court's First Amendment jurisprudence; rather the *Cook*

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[5] Although in *Cook* the Connecticut Supreme Court rejected the respondent's claim that the evidence of his making a "true threat" was insufficient as a matter of law, see 287 Conn. at 255-256, the *Cook* Court did state "[i]t also is true that a juror, apprised of all the relevant facts, reasonably could conclude that the [respondent's] actions were nothing more than mere puffery or bravado, prompted by DelFranco's own provocative behavior toward the [respondent]." *Id.* 255. It should be recalled that the jurors *acquitted* the respondent of the charge of *threatening* in the second degree. It should further be noted that the *Cook* Court also stated that "a reasonable juror could conclude that the [respondent] possessed the table leg only for defensive purposes". *Id.* 256 n.12. The Connecticut Supreme Court has previously held that self-defense can apply to the charge of carrying a dangerous instrument under statutes like §53-206. See *State v. Ramos*, 271 Conn. at 802-804 (when otherwise innocuous item is used in a weapon-like manner, accused may claim that such use was justified as self-defense). Article I, §15 of the Connecticut Constitution provides: "Every citizen has a right to bear arms in defense of himself . . . ".

Court properly applied that jurisprudence to the circumstances in this case and properly determined that First Amendment considerations required that the jury in this case be instructed with the "true threats" doctrine in order to ensure that the respondent could properly be convicted under §53-206 *and* §53a-3(7) for carrying a table leg, only where the table leg truly qualified as a "dangerous instrument" because the respondent is proven beyond a reasonable doubt to have made a "true threat" to use it in a manner capable of causing serious physical injury. If the respondent's alleged threat is not proven to be a "true threat" (*e.g.*, because it was non-serious, bravado, puffery, hyperbole, or a joke or protected expression of his right to bear arms in self-defense) then the alleged threat is constitutionally protected and cannot be punished. This would also mean that the carrying of the table leg was not illegal because it did not qualify as a dangerous instrument. The respondent is entitled to have his case decided before new jurors properly instructed on Connecticut's law, as these statutes have been construed by the Connecticut Supreme Court.

The petition for certiorari should be denied.

Respectfully Submitted,

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